from tax in the amount of the share so included.

* * * * *

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 583.

SUFFOLK SECURITIES CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF OF PETITIONER.

DAVID A. BUCKLEY, JR.,
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1. There is no question and it is freely conceded that the Suffolk Securities Co. was not formed for any purpose concerning surtaxes or the nonpayment of surtaxes. The great old sugar mercantile house of B. H. Howell & Co. was financially embarrassed in 1922 and with the consent of the bank its operation and assets were set aside in various forms (R. 18, 86). One of the means used was the Suffolk Securities Co. This company assumed large liabilities to the banks and took over the liquidation of the Argentine contracts (R. 21). This latter operation, for

example, was not concluded until 1932 (R. 90). From time to time as some of the Howells were released they, in turn, took down their share of the Suffolk Security Co. and gradually the late Mr. James H. Post was left as the sole shareholder (R. 21).

In the case at bar the year 1930 is in question. No other year in the history of the corporation is or has been in dispute since its organization in 1922.

The above facts are stated in response to the reply brief as they are apparently overlooked in the consideration in that brief.

2. This Court has accepted for review the case of *Commissioner* v. *Chicago Stockyards Co.*, 129 Fed. (2nd) 937, which involves the assessment of taxes under Section 104 of the Revenue Act of 1928 and 1932. The present case involves many of the same legal points and merits the consideration of this Court at the same time.

3. There was no motive in this case for the evasion of surtaxes. Mr. Post was a great benefactor of charity and for at least nine years had given away practically all his income (R. 120-124). Any finding which picks out one year under Sec. 104 presents an isolated and purely arbitrary presumption contrary to the facts and the law. Mr. Post's motives are attacked because the respondent's brief says he borrowed money from the company, but the record shows that a large part of this was to pay off B. H. Howell & Co., loans—in other words it was all part of the liquidating of the old firm. Another part of the borrowings was offset completely by loans to the company and this money came from another liquidating source (R. 92).

4. The words in the statute "availed of * * *" have never been fully interpreted by this Court. Certainly one year in the life of a corporation devoted to its original objects cannot be isolated and made the subject of a penalty. The infliction of a penalty tax is not in accord with a reasonable interpretation of law nor application.

5. The respondent on page 10, paragraph 5 of its brief, cites the case of *Helvering* v. *National Grocery Co.*, 304 U. S. 282-294, and *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 52-53, in support of the constitutionality of Section 105, as applied in the case.

The National Grocery Co. case did not involve the question of the right under the Delaware Statute to declare a dividend when there was a deficit because of a depreciation in the value of its assets or the distribution of more than a book surplus. In that case the company had a large accumulated surplus even after allowance for the depreciation of its assets and the Delaware Statute did not prohibit it from declaring dividends (Petitioner's Brief, page 17). In the instant case there was a deficit after depreciation of its capital and its book surplus for the year was less than the amount upon which the 50% tax was imposed.

The *Northwest Steel Mills* case involved a different section of the law, which imposed taxes on undistributed profits for the year, and did not involve the question of distribution from accumulated surplus or deficit.

6. We believe the questions in this case need a healthy and complete review and the *Chicago Stockyards* case presents this opportunity. This case likewise presents certain novel points of law. It will be helpful to have these questions decided by this Court.

Respectfully submitted,

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